90-1810

No. _____

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

JAMES F. HICKEY,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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Printed by
Bookcrafters, Inc.
at Connecticut Printers
East Hartford, CT 06108
860-289-1

QUESTIONS PRESENTED

I. WHETHER THE PETITIONER'S SIXTH AMENDMENT CLAIM THAT THE INFORMATION WAS IMPERMISSIBLY VAGUE AS TO THE TIME OF THE OFFENSE IS WORTHY OF CERTIORARI REVIEW?

II. WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE PETITIONER'S CLAIM THAT AN EVIDENTIARY ERROR WAS MADE AT HIS TRIAL?

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CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ...

STATUTORY PROVISIONS INVOLVED

Connecticut General Statutes §53a-71 (Rev. to 1989).

Sexual assault in the second degree: Class C felony: Nine months not suspendible.

(a) "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under sixteen years of age ...".

Connecticut General Statutes §53-21. Injury or risk of injury to, or impairing morals of, children.

Connecticut General Statutes §53-21. Injury or risk of injury to, or impairing morals of, children.

Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both.

SUPREME COURT RULES INVOLVED

Rule 10(1)(c). Considerations Governing Review on Writ of Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are

special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered: ...

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

OPINION BELOW

The opinion of the Connecticut Appellate Court is printed at 23 Conn. App. 712, 584 A.2d 473 (1991).

STATEMENT OF THE CASE

A. Procedural History

The petitioner was charged with one count each of sexual assault in the second degree; General Statutes §53a-71(a)(1); and risk of injury; General Statutes §53-21; arising out of an act of sexual intercourse with the teenage victim. After a jury trial, the petitioner was convicted on both counts. He was subsequently sentenced to a term of imprisonment of eight years on each count, the two sentences to run concurrently. R. at 11.

Petitioner appealed his convictions to the Connecticut Appellate Court. That court unanimously affirmed. State v. Hickey, 23 Conn. App. 712, 584 A.2d 473 (1991). The Connecticut Supreme Court denied certification to review the case on February 5, 1991.

B. Facts Relating To The Offenses

In July, 1988, the petitioner was the live-in boyfriend of the victim's grandmother. On an unspecified date during that month, the victim and her two siblings spent the day with their grandmother at her East Hartford apartment. While the grandmother and the victim's siblings swam in the apartment complex swimming pool, the victim and the petitioner went upstairs to the apartment. As the victim sat on a reclining chair, the petitioner partially removed her bathing suit and had sexual intercourse with her.

C. Facts Pertinent To The Petitioner's Claims

1. The Sixth Amendment claim

The information on which the state proceeded to trial alleged that the petitioner engaged in sexual intercourse with

a person under the age of sixteen years "on or about July, 1988."

Before trial, defense counsel requested more specific information as to the date of the offense and claimed that the state's failure to particularize the date of the offense deprived him of a possible alibi. The trial court denied the petitioner's request.

At trial, which took place in October, 1989, the victim testified that she was then 15 years old. She also testified that the incident occurred during the summer of 1988 and that she could not remember the day or month.

About a month after the incident, the victim discussed the incident with a friend and used a pregnancy test. On August 23, 1988, after an additional week had passed, she contacted the police.

The petitioner and the victim's grandmother both testified that they remembered the day the victim and her siblings came to visit and swam in the pool. The petitioner stated that it was in the middle of July and admitted being in the apartment with the victim that day. He denied having sexual intercourse with her.

2. The challenge to the limiting instruction on uncharged conduct

The petitioner was initially charged with two counts each of sexual assault in the second degree and risk of injury, arising out of two separate incidents of sexual intercourse with the victim. Before trial, the prosecution withdrew the charges relating to the earlier incident and the trial court instructed the state not to refer to it or elicit testimony about it.

However, when defense counsel asked the victim during cross-examination when the charged incident took place, she stated, "Umm, what do you mean by that question? The first time? Or the last time?". Defense counsel requested a sidebar conference, but no record exists as to what transpired. Then, defense counsel proceeded with questioning on the July, 1988 incident.

During its deliberations, the jury sent out a note requesting to have the victim's references to prior sexual contact read aloud. The victim's comment quoted above was the only such reference found.

Defense counsel objected to the court's allowing the reference to be reread. The trial court overruled the objection, reasoning that the petitioner was not entitled to have the evidence stricken, in

effect, when he failed to object or move to strike it at the time it was admitted. Defense counsel later admitted to the court that his failure to move to strike the victim's comment was a strategic decision not to highlight the other incident in the minds of the jurors.

The petitioner next asked for a limiting instruction. The victim's remark was reread to the jurors after the trial court cautioned them that the only question before them was whether the petitioner had sexual intercourse with the victim on the date charged.

D. Petitioner's Claims On Appeal And Disposition Reached By The Connecticut Appellate Court

1. Sixth Amendment claim

On appeal, the petitioner argued that the trial court's denial of his request for additional information as to the time of

the incident violated his Sixth Amendment right to be apprised of the nature of the offense. The Appellate Court ruled that the state's allegation that the offense took place on or about July, 1988 complied with the Sixth Amendment because it was as specific as the available evidence warranted and had a definite beginning and end. 23 Conn. App at 715, 584 A.2d at 475. It cited a number of Connecticut decisions which have applied a similar analysis under the Sixth Amendment. Id., citing State v. Blasius, 211 Conn. 455, 461, 559 A.2d 1116 (1989); State v. Spigarolo, 210 Conn. 359, 386, 556 A.2d 112, cert. denied, ___ U.S. ___, 110 S.Ct. 322 (1989); State v. Laracuente, 205 Conn. 515, 519, 534 A.2d 882 (1987), cert. denied, 485 U.S. 1036 (1988); State v. Saraceno, 15 Conn. App. 222, 237, 545 A.2d 1116 (1988); State v.

Mancinone, 15 Conn. App. 251, 257, 545 A.2d 1131, cert. denied, 209 Conn. 818, 551 A.2d 757 (1988), cert. denied, 489 U.S. 1017 (1989).

2. Limiting instruction on uncharged incident

The petitioner raised several claims relating to the victim's reference to another incident of sexual intercourse. He argued that the trial court was required, sua sponte, to strike the comment or give a limiting instruction, that the court erred in allowing the reference to be reread to the jury and that the court failed to give a proper limiting instruction at the time of the rereading.

The Appellate Court rejected all of the petitioner's claims. It ruled that a correct limiting instruction had been given

when the testimony was reread to the jury. 23 Conn. App. at 718-19, 584 A.2d at 477.

REASONS TO DENY PETITION

A. Petitioner's Sixth Amendment Claim

The petitioner has failed to assert or demonstrate any conflict among the circuits or state courts regarding Sixth Amendment requirements for specificity in the charging document as to the time of the offense. Accordingly, the issue does not qualify for certiorari under Rule 10(1)(b).

Indeed, the interpretation of the Sixth Amendment in the Connecticut cases cited by the Appellate Court is entirely in accord with settled law. Federal cases have consistently stated that an information affords proper Sixth Amendment notice if it adequately apprises the defendant of the offense so that he may prepare his defense

and, in the event of a future prosecution, assert the conviction as a bar for double jeopardy purposes. Rosen v. United States, 161 U.S. 29 (1896); United States v. Roman, 728 F.2d 846, 850 (7th Cir. 1984), cert. denied, 466 U.S. 2360 (1984); United States v. Giles, 756 F.2d 1085, 1087 (5th Cir. 1985).

The charging document must set forth each of the elements of the offense; id.; United States v. Tavelman, 650 F.2d 1133 (9th Cir. 1981); and identify the time and place with reasonable certainty. Wong Tai v. United States, 273 U.S. 77 (1927); Rosen v. United States, supra; United States v. Cruickshank, 92 U.S. 588 (1876). The time of the offense may be alleged in general terms as long as the date is not material to an element. United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984); United

States v. Morris, 700 F.2d 427 (1st. Cir. 1983).

Federal courts have upheld the validity of indictments alleging time periods as long or longer than that charged in this case. See e.g. United States v. Roman, supra (11-year period); United States v. Giles, supra (16 month period); United States v. Nunez, 668 F.2d 10 (1st Cir. 1981)(1-year period).

Further, where the date of an offense is not material to the elements, any claim of error must be accompanied by a satisfactory showing of prejudice. United States v. Morris, supra, United States v. Celaya-Garcia, 583 F.2d 210, 211 (5th Cir. 1978).[1]

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[1] In general, it is not the practice of federal courts to reverse convictions on the basis of technical defects which cause no prejudice at trial. Russell v. United States, 369 U.S. 749 (1962); United States (continued...)

A bald assertion that an alibi might have existed if the specific date were known does not suffice. Id.

In this case, the Connecticut Appellate Court correctly determined that the notice afforded in the information was sufficient under the Sixth Amendment. First, the date was not material to either offense--despite the necessity of proving that the victim was less than 16 years old in July, 1988--since she was only 15 at the time of trial, October, 1989. In addition, the state limited itself to the defined period of July, 1988 and its failure to specify a more exact date was attributable to the victim's inability to recall any

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[1](...continued)
v. Celaya-Garcia, 583 F.2d 210, 211 (5th Cir. 1978); United States v. Roman, 728 F.2d 846, 850 (7th Cir. 1984); F. Rule Crim. Proc. 52.

more precise information. This lack of recollection of the date is not unusual or unreasonable given the delay of several weeks before the victim discussed the incident with anyone. See generally Coy v. Iowa, ___ U.S. ___, 108 S.Ct. 2798, 2803-04 (1988)(O'Connor, J., concurring) (recognizing difficulties of prosecuting cases of child abuse because of victims' immaturity). Under these circumstances, the Appellate Court properly found the notice given reasonable under the Sixth Amendment.

Furthermore, the record of this case conclusively rebuts any claim of prejudice. The testimony concerning the timing of the pregnancy test and the victim's August 23 report to the police, relative to the offense, narrowed the time period considerably. In addition, the petitioner's own admission that he was in the apartment with

the victim on the day in question precludes the existence of any alibi.

Accordingly, the conclusion of the Connecticut Appellate Court that the petitioner failed to demonstrate how the exact date of the offense was material or necessary to the defense was entirely correct and consistent with federal law. The petitioner's Sixth Amendment Claim is not worthy of certiorari review.

B. Limiting Instruction On Uncharged Conduct

This claim fails to qualify for certiorari because it presents no federal question, a jurisdictional prerequisite. U.S. Const. Art. 3, Sec. 2, Cl. 1; 28 U.S.C. 1257. See also Rules of the Supreme Court, Rule 10 (1)(c).

The necessity or adequacy of a limiting instruction relating to the victim's

comment about another incident is purely evidentiary and thus raises only an issue of state law. Since states are not bound to follow the federal rules of evidence, the petitioner's citation thereto is misplaced.

This Court has stated that it does not grant certiorari to review evidence and discuss specific facts. Texas v. Mead, 465 U.S. 1041 (1984), quoting United States v. Johnson, 268 U.S. 220, 227 (1925). Accordingly, the petitioner's claim regarding the reference to an uncharged incident does not qualify for certiorari.

CONCLUSION

For the foregoing reasons, The State of Connecticut respectfully urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

STATE OF CONNECTICUT

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